Nos. 59, 60

In the Supreme Court of the United States

October Term, 1965

UNITED STATES OF AMERICA, Appellant

v.

CECIL RAY PRICE, Et Al

Appeals from the United States District Court for the Southern District of Mississippi, Eastern Division

BRIEF FOR THE APPELLEES

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UNITED STATES OF AMERICA, Appellant

vs.

CECIL RAY PRICE, Et Al, Appellees

BRIEF FOR THE APPELLEES

The opinions of the District Court appear at record page 4-7, 18-25, and are not reported.

JURISDICTION

The jurisdiction of this Honorable Court to review the decision of the District Court on direct appeal in case number 59 is conceded.

QUESTIONS PRESENTED

No. 1. Does Section 241 of Title 18 of the United States Code encompass the due process clause of the Fourteenth Amendment, by an extention to an interference with the privileges and immunities of one citizen as against another citizen to be free of an assault and battery and/or murder inflicted by one citizen against another citizen?

No. 2. Whether the decision of the District Court in case number 60 was based, at least in part, on an in-

terpretation of the indictment, and there being, therefore, no statute construed by the District Court, whether the Court on this appeal in case number 60 has jurisdiction.

STATUTES INVOLVED

The statutes involved as presented to the District Court are 18 U. S. C. 241, 18 U. S. C. 242, and 18 U. S. C. 371, together with the Fourteenth Amendment to the Constitution of the United States.

18 U. S. C. 241 provides:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

18 U. S. C. 242 provides:

> Whoever, under color of law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any State, Territory, or District to the deprivation, of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

18 U. S. C. 371 provides in part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . .

The Fourteenth Amendment provides in part as follows:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

On January 15, 1965, a United States grand jury for the Southern District of Mississippi, Eastern Division, returned two indictments (R. 1-2, 11-16) charging eighteen persons with a violation of 18 U. S. C. 241, and 18 U. S. C. 242, and 18 U. S. C. 371. The indictment bearing Criminal number 5215 in the District Court, now number 59 in this Court, returned under 18 U. S. C. 241, charged all the Appellees with having conspired together with each other and other persons unknown, to injure, oppress, threaten and intimidate Michael Henry Schwerner, James Earl Chaney, and Andrew Goodman, each a citizen of the United States, in the free exercise and en-

joyment of the rights and privileges secured to them by the Fourteenth Amendment to the Constitution of the United States, not to be deprived of life or liberty without due process of law by persons acting under color of laws of Mississippi. The indictment further charges the plan and purpose of the conspiracy in that Cecil Ray Price while having Michael Henry Schwerner, James Earl Chaney and Andrew Goodman in his custody in the Neshoba County jail located in Philadelphia, Mississippi, would release them from custody at such time they would be intercepted by others upon their leaving the area of the Neshoba County jail, and that they would then be threatened, assaulted, shot and killed.

A motion to dismiss the indictment returned under Section 241 was filed on behalf of the Appellees on January 25, 1965, upon the grounds that the indictment did not state facts sufficient to constitute an offense against the United States.

The District Court, by opinion dated February 24, 1965, sustained the motion to dismiss the indictment predicated upon 18 U. S. C. 241; an order was entered dismissing the same on March 2, 1965, holding that the indictment did not state an offense against the laws of the United States. The alleged offense in the indictment was said to have been committed in Neshoba County, Mississippi. The Court held that Section 241 was designed and intended for the protection of federally created rights and not for any right merely guaranteed by the laws of the United States. The District Court held, (R. 4-5) that the statute in question did not make murder a federal crime, that the right of every person not to be deprived of his life or liberty without due process of law was a right that existed prior to the Federal Constitution, and was a right which is protected by State laws. The District Court cited the case of UNITED STATES vs CRUIKSHANK, 92 US. 588; WIL-

LIAMS vs UNITED STATES (5CA) 179 F. 2d 644, (1950), and UNITED STATES vs WILLIAMS 341 US. 70, 71 S. Ct. 581. The District Court held that the Fourteenth Amendment prohibits the State from depriving any person of life, liberty or property without due process of law, but that such added nothing to the rights of one citizen as against another, and that the defendants were not charged with a violation of any right which was conferred upon either of the victims by a federal law, and that it was of no consequence in law that some of the defendants were officials and some of them were merely private citizens as to the charge and indictment returned under Section 241. The District Court also held that Section 241 was the sole and exclusive exponent of the offense set forth in the indictment and as such the indictment did not charge the defendants with any offense against the laws of the United States, but that the indictment surely stated a heinous crime against the State of Mississippi.

The second indictment being Criminal Case number 5216, now number 60 in this Court, charged all the defendants with the violation of 18 U. S. C. 371 and 18 U. S. C. 242.

Count one of that indictment charged all of the defendants with a conspiracy to commit an offense against the United States in violation of 18 U. S. C. 371, charging further that the defendants conspired to wilfully subject Michael Henry Schwerner, James Earl Chaney and Andrew Goodman, each an inhabitant of the State of Mississippi, to the deprivation of their rights, privilege and immunity secured and protected by the Fourteenth Amendment to the Constitution of the United States not to be summarily punished without due process of law by persons acting under color of law of the State of Mississippi, and stated further the release from custody, the interception, the threats, assaults, shooting and kill-

ing. The indictment further states the overt acts necessary to support the charge. The District Court upheld count one of the indictment, which charged all of the defendants with general conspiracy to commit an offense against the United States.

The 2, 3, and 4 count of the indictment in number 60 charged substantive violations of Section 242, as against all of the defendants, the three officers of the law as well as the private citizens. Each count is the same as to the charges of acts under color of law in violation of the aforesaid Section 242, including charges of wilful assault, shooting and killing an inhabitant of the State of Mississippi, then and there in the custody of the sheriff, with the intent of punishing the victims without due process of law, and with the intent to deprive them of their life and liberty and the right and privilege to be secure in his person while in the custody of the State of Mississippi, and the right and privilege to be immune from summary punishment without due process, and the right to be tried by due process of law of an alleged offense. The District Court sustained motions to dismiss counts 2, 3, and 4 as to all of the private individuals and denied similar motions in respect to the three defendants who are law enforcement officers. (R. 23-26). The indictment in number 60, (R. 11-16) made no reference to 18 U. S. C. 2, the aiding and abetting statute, and the District Court had no opportunity to pass on any question under 18 U. S. C. 2.

ARGUMENT

INTRODUCTION:

It is contended by the Appellees that Section 241 extends to federally created rights, or rights arising by virtue of the relationship of the victim and the Federal Government and further that Section 241, since its authority and power stems from the Constitution, does not include a guaranty of protection against assault and battery and murder, and neither does it extend to conspiracy to commit an assault and battery and murder.

Every power of the Federal Government and the exercise of that power is circumscribed, granted or limited by the Constitution of the United States. The Federal Courts have only such powers as are conferred by the valid acts of congress. No common law criminal jurisdiction exists, and all criminal statutes should be strictly construed. PRUSSIAN v. UNITED STATES, 282, US. 675, 677, 75 L. ed. 610, 612, (1931). And doubt must be resolved against broadening the scope of a criminal statutes. UNITED STATES v. ADIELIZZIO 77 F. 2d 841, 844 (7th Cir. 1935).

I.

SECTION 241 OF THE CRIMINAL CODE DOES NOT REACH INTERFERENCES WITH THE EXERCISE OF NATURAL RIGHTS OF THE CITIZEN OR INHABITANT, AND SUCH INTERFERENCES ARE NOT ENCOMPASSED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is readily admitted that it is the duty of every republican government to protect the equality of the rights of its citizens, yet the right of punishment of one citizen for injure or harm to another arising from natural rights of the latter, was rightfully assumed by the respective States, and such duty should remain with the States.

The obligation rests upon the United States to see that the States do not deny the right to such protection, and this the Fourteenth Amendment guarantees, but no more. "No state shall make or enforce any law, which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the law." This Constitutional guaranty protects the citizen from encroachment by the States. The congress has power to enforce, by appropriate legislation, the aforesaid provisions of the Fourteenth Amendment, and it is clear that the congress did so by enacting 18 U. S. C. 242.

The right to be free of assault and battery as between one citizen and another or an assault and battery and murder by one citizen against another is not protected by the Fourteenth Amendment of the Constitution and is not reached by Section 241 of Title 18 U. S. C.; and such is true as to a charge of conspiracy to commit false imprisonment, assault and murder.

It is therefore respectfully contended that the Congress had in mind, in passing Section 241, the Federal rights which pertain to citizens of the United States and not the general guaranty against abridgement by the States extended to all persons by the clause of the Fourteenth Amendment. This position is supported by the case of UNITED STATES vs. CLASSIC, 313 US. 299, 61 S. Ct. 1031, 85 L. ed. 1368. In that case the right of a citizen to vote for a congressman was involved. Ex PARTE YARBROUGH, 110 US. 651, 4 S. Ct. 152, 28 L. ed. 274, also involved the right of a citizen to vote and in that case it appears that the Fifteenth Amendment, and not the Fourteenth Amendment was rested upon. GUINN vs. UNITED STATES, 238 US. 347, 59 L. ed. 1340 (1915), UNITED STATES vs. MOSLEY, 238 US.

383, 59 L. ed. 1355 (1915), UNITED STATES vs. SAYLOR, 322 US. 385, 88 L. ed. 1341 (1944); the right to establish a claim under the Homestead Acts, this being a right "wholly" dependent upon an Act of Congress. UNITED STATES vs. WADDELL, 112, US. 76, 28 L. ed. 673 (1884); the right of citizens in custody of a United States marshall to be free from assault, LOGAN vs. UNITED STATES, 144 US. 263, 36 L. ed. 429 (1892), and the right to inform on violations of federal laws, In Re QUARLES, 158 US. 532, 39 L. ed. 1080 (1895), MOTES vs. UNITED STATES, 178 US. 458, 44 L. ed. 1150 (1900). The rights under the due process clause of the Fourteenth Amendment are secured to everyone, not just to citizens. Section 241 does not reach the conduct described in the indictment in number 59.

Section 241 is different from Section 242, even though both sections have to do with federally secured rights, Section 242 creates a misdemeanor offense, done under color of law against an inhabitant on account of color or race, and punishes criminal acts, and not a conspiracy to commit acts, while on the other hand Section 241 creates a felony offense and punishes persons who conspire to commit an act, and makes no reference to color of law; it also adds an additional separate and independent crime of going on the highway or premises of another with the bad intent to hinder the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States.

The words "under color of law" placed in the indictment in case number 59 do not aid in the determination of whether or not the Fourteenth Amendment is an exponent of Section 241. By the language "under color of law" a misdemeanor created by Section 242 cannot be converted into a felony under Section 241. All appellees are under indictment returned under 18 U. S. C. 371, and the three officers remain under valid indict-

ment under Section 242. It is crystal clear that Section 242 encompasses the guaranty of the Fourteenth Amendment, and that Section 371 makes persons vulnerable for prosecution who have conspired to violate Section 242. Then without overlapping Section 241 encompasses rights arising by virtue of the relationship of the victim and the Federal government. Whether conviction be valid under Section 241 depends upon the inclusiveness of that Section, and the same cannot be expanded merely by the fact that the draftsman may have used the words "under color of law". It would be untenable to contend that both Section 242 and Section 241 apply or cover the same rights. The Appellants contend that the Appellees should be punished under the general conspiracy statute 18 U. S. C. 371, on substantive charge under Section 242 and under Section 241, a felony charge. It would clearly appear then, that to charge the Appellees under Section 241 with conspiracy and also a charge under Section 371 of conspiracy to violate a law of the United States, and then a substantive charge under Section 242 would merely be an effort to expand the punishment. A construction, however, of Section 241 to include that said section was established to protect the rights of individuals that arise from the relationship of the indivdual and the Federal government, would prevent overlapping of the statutes and bear on the intent of the congress. If the exponent of the indictment under Section 241 had to do with the relationship arising between the citizen and the Federal government, such as the right to vote for a congressman, or some such federally created right, in such an event, a valid offense against the United States would have been charged. The right to vote for a congressman in a general election is a federally secured right. Ex PARTE YARBROUGH, supra, and QUINN vs. UNITED STATES, supra.

It should appear untenable to contend that the Federal Constitution secures to a citizen of the United States the

right to be free of assault and murder, oppression, or interference by other citizens; such rights are natural rights. The protection of such natural rights rests with the respective States.

The Fourteenth Amendment did not grant or create federal citizenship rights; it broadened the protection against encroachment by the State, but it did not add to or increase any right of one citizen against another, and the powers of the national government are limited to the enforcement of that guaranty. UNITED STATES vs. CRUIKSHANK, 92 US. 588 (1875) 23 L. ed. 542.

Perhaps it would be conceded that it is true that in cases such as Ex PARTE YARBROUGH, 110 US. 651 (1834); LOGAN vs. UNITED STATES, 144 US. 263 (1892); and in RE QUARLES, 158 US. 532 (1895), where the right violated involved the relationship of the individual with the Federal Government, the Court very often emphasized that relationship. And in such cases the defendants were private individuals who had not acted under color of State Law and there was no attempt to demonstrate the relationship of the conduct of the defendants to the Fourteenth Amendment rights, and it was accordingly important to emphasize the peculiarly Federal nature of the right in order to sustain the prosecutions. Since it is now contended by the Appellant, with which we agree, that it matters not whether the defendants are officers or private individuals as to Section 241, then why shouldn't cases like Yarbrough, Logan and Quarles, supra, be considered judicial determinations that Section 241 could be used only in cases involving these peculiarly Federal rights. Certainly such cases can be taken to indicate that there was no State Action of any sort or attempt to demonstrate a relationship between the conduct charged and acts under color of law, and certainly a Federal-type right is important in order to sustain prosecution of a private individual. Accord-

ingly we assume it is now said—so goes the argument—that the Fourteenth Amendment creates a positive Federal-type right without regard to acts or charges under color of law; such a position, however, is not plausible, neither is it consistent with the language of the Amendment. The indictment under Section 241, number 59 in this Court, states that the conspiracy was to injure, oppress, threaten and intimidate the named victims in the free exercise and enjoyment of the right and privilege secured to them by the Fourteenth Amendment—not to be deprived of life or liberty without due process of law by persons acting under color of the laws of Mississippi. As already stated, for the purpose of the scope of 241 the indictment might as well have ended without the words "under color of the laws of Mississippi". So the charge in the indictment then is that the injury was to the free exercise and enjoyment of the right secured by the Amendment. In other words, the right and privilege secured by the Fourteenth Amendment as charged in the indictment was not to be deprived of life or liberty without due process of law, or the exercise of that right, but that which was charged to have occurred was an injury and intimidation of the exercise of that right to life and liberty, a natural right. The Amendment did not guarantee life or liberty from injury, neither did it secure the citizen or inhabitant the exercise of the freedom of life without assault or injury. The Amendment guaranteed that there would be no encroachment by the State on life or liberty without due process of law, and accordingly the charge made in the indictment deals with nothing guaranteed or secured by the Amendment, and therefore the Acts charged by the indictment could not have interfered with the due process secured by the Amendment. We take it that only "state action" can deprive a person of a Fourteenth Amendment right. The deprivation of a right can obviously be effected only by

the entity which is under an obligation to fulfill the right. Where a State operates a biracial school system, students may be deprived of their right to attend school without regard to color. No private person could deprive a child of the right to attend school without regard to race since private persons have no duty to accord a non-discriminatory education. One can be deprived of a right only by the person or entity which is under the duty to fulfill the right. The Appellant, upon conceding the above, may contend that the injury was to the free exercise and enjoyment of the right secured to him by the laws of the United States and/or the Constitution. We need to remember that the indictment in number 59 deals—it is said, only with Fourteenth Amendment rights. To go then further with the contention that the charge in the indictment is not for deprivation of Fourteenth Amendment rights, but is only a charge of interfering with the free exercise of such rights guaranteed by the Amendment is to simply attempt to change the nature of the guaranty of the Amendment. It cannot be said with sound reasoning that a person has a natural right to life and when that natural right is interfered with that by virtue of the fact that the Fourteenth Amendment guaranteed it to him without encroachment by the State such an occurrence, such as a false imprisonment, assault and murder, gives rise to an interference with that Federal-type right that should extend the strong arm of the Federal government to the States for punishment of such offenses without regard to State action. The line must be drawn, else there can be no criterion or rule of law permitting a balance of law enforcement powers.

In the case of UNITED STATES vs. BAILES, 120 F. Supp. 614 (S. D. W. Va., 1954) an indictment was sought under 18 U. S. C. 241 charging defendants with conspiring to unlawfully injure, oppress, threaten, and in-

timidate 58 persons in their exercise of the right to refrain from forming, joining or assisting labor organizations. The District Court dismissed the indictment on two grounds, one that the right of employees to organize or refrain from organizing is not a right granted by or dependent on the Constitution or law of the United States since the right existed before the Consitution was adopted, and hence the Court concluded under the doctrine laid down in the case of UNITED STATES vs. WILLIAMS, 341 US. 70 (1951), that 18 U. S. C. 241 had no application; further the court held that the defendants were all charged in their individual capacities and that the provisions of the Labor Management Relations Act, the violation of which was the basis for the indictment, were not intended to protect employees against private persons. The indictment in number 59 in this Court deals only with rights that were in existence before the adoption of the Constitution, the right to life and liberty and the right of freedom from interference with life and liberty, all being natural rights. Such are the attributes of citizenship under a free government. It derives its source, to use the language of Chief Justice Marshall, in GIBBONS v. OGDEN, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." And quoting from UNITED STATES vs. CRUIKSHANK, supra, "It is found whereever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States, when established, found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to congress, it remains, according to the ruling in GIBBONS v. OGDEN, 9 Wheat, 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of congress as came within the general scope of the authority granted to the National Government."

In the Case of United States v. Wheeler, 254 U. S. 281, (1920), the right there involved was the right to move from place to place, free ingress thereto and egress therefrom. The District Court in 254 Fed. 611 (1918), had held that Section 19 had the same meaning when it was enacted as Section 6 of the Act of May 31, 1870, and that it was intended to protect the political rights of citizens of the United States in the several States and not their civil rights as mere persons, residents or inhabitants. See also Baldwin v. Franks, 120 U. S. 678. Affirming the Wheeler case on appeal, the Court stated that Crandall v. Nevada, 6 Wall. 35, on which the government had relied, was inapplicable.

In United States v. Bathgate, et al, 246 U. S. 220, the Court would not extend the ruling in the MOSLEY, or YARBROUGH or WADDELL or LOGAN cases to a conspiracy to bribe voters at a general election within a State where presidential electors were chosen. "The real point involved is whether Section 19 (241) denounces as criminal a conspiracy to bribe voters at a general election within a State where presidential electors, a United States senator and a representative in Congress are to be chosen. Our concern is not with the power of Congress but with the proper interpretation of action taken by it. This must be ascertained in view of the settled rule that 'there can be no constructive offenses, and before a man can be punished his case must be plainly and unmistakably within the statute' (United States v. Lasher, 134 U. S. 624, 628)".

In Hodges v. United States, 203 U. S. 1 (1906), the question involved was whether a conspiracy to forcibly prevent citizens from disposing of their labor by contract upon such terms as they deemed desirable, infringed a right or privilege dependent upon the Constitution

of the United States, and the question was answered in the negative.

In the case of Walker v. United States, 93 F. 2d 383 (C. C. A. 8), an indictment under Section 19 (19 U. S. C.) and Section 51, charging a conspiracy to injure citizens in their right to vote for presidential electors, the court held that such an indictment charged no federal offense since presidential electors are State officers, and not Federal officers. Ex Parte Yarbrough, supra, was distinguished, and in doing so the Court held that the right to vote for presidential electors depends directly and exclusively on state legislation.

A. LEGISLATIVE HISTORY — REFERENCE TO REMARKS OF SENATOR POOL.

It is contended on page 10 of the Appellant's brief that the rights guaranteed by due process clause of the Fourteenth Amendment are rights and privileges secured by the Constitution within the meaning of Section 241, and that same arises from the language of the Statute, its context and its Legislative history, and then on page 13 of the Appellant's brief, making reference to history in the judicial field, it is stated that such does not come from a venerable tradition initiated by judges who were immediately familiar with the enactment of the provision, and then to support such contention, remarks of Senator Pool of North Carolina are cited and reported fully in the Appendix of the brief. We respectfully call the Court's attention to page 39, being a part of Senator Pool's remarks, noting that on line 5 thereof, the Senator speaks of "in the exercise of their rights." On the same page in the same paragraph we note the following: "the Fifteenth Amendment to the Constitution of the United States provides that the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on ac-

count of race, color, or previous condition of servitude. It speaks of 'the right of citizens to vote'." Senator Pool goes on to state that voting is a right and that the same shall not be denied or abridged by the United States or by any State. It is contended by Senator Pool that the Legislation then about to be enacted should apply to individuals, and that individuals should be reached by virtue of the word "deny" in that—so goes the argument—States by acts of omission may practically deny the rights secured by the Constitution, and that the Legislation of congress must be to supplement acts of omission on the part of the States. It is important to note that throughout Senator Pool's speech he referred to the right to vote and such rights as arise from the relationship of the victim with the Federal Government, and this is the import given to the word "citizens". Senator Pool then refers on page 40 and 41 to the Fourteenth Amendment, stating that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deny to any person within its jurisdiction equal protection of the laws, and there the emphasis was placed on the word "deny", but still the Senator refers to rights of citizens and there stated that "it shall not deny by acts of omission, by failure to prevent its own citizens from depriving by force any of their fellow-citizens of these rights." He there contends that if a State omits to carry into effect the provisions of the civil rights act, to secure the citizens in their rights, that the provisions of the fifth section of the Fourteenth Amendment will be called into operation, which is "that congress shall enforce by appropriate Legislation the provisions of this article." The emphasis placed on the words "citizens and their rights" simply means that there is something more intended in the relationship of the victim regardless of whether he be a citizen or an inhabitant in order to form a basis or give rise to an extension of the arm

of the national government. Certainly this has been the basis in regard to school desegregation decisions, the interstate commerce cases, and with the same principle implanted into the 1964 civil rights legislation having to do with whether or not an establishment comes within interstate commerce. On page 43 Senator Pool advocates in his speech, for the first time, that something should be done about conspiracies organized for the express purpose of contravening the right conferred by the Fifteenth Amendment, and he again, in our opinion, defined rights arising from the relationship of the victim and the federal government. Then in paragraph 2 of Senator Pool's remarks on page 43, he speaks further of those who would take upon themselves to compel his fellow citizen to vote in a particular way and then he said, as concerns such compulsions in regard to voting, that there should be legislation "against that". Then on page 46 after having continuously talked about the right of suffrage and oppression of citizens in regard to voting which evidently was the intent and purpose of Senator Pool's speech, he states "there is another feature of my amendment which I deem of some importance. It is this: 'that if in the act of violating any provision in either of the two preceding sections any other felony, crime or misdemeanor shall be committed, the offender may be indicted or prosecuted for the same in the courts of the United States'." Then Senator Pool went on to state that he felt that a most effective mode of preventing intimidation and attempts of coercion would be in making "any offense commited in the effort to violate them indictable before the courts of the United States." **Senator Pool's thinking in this regard was not extended by the congress and in the mind of the writer such would be substantial proof of Legislative intent not to extend Section 241 to the relationship of one citizen to another citizen.** Accordingly the entire import of Senator Pool's speech is that the strong arm of the national govern-

ment should extend to individuals, true, who seek to conspire to intimidate and threaten citizens relative to an exercise of their rights arising because of and from the relationship of the victim with the United States government, rather than any and all offenses committed by private citizens or inhabitants against another private citizen or inhabitants.

To repeat, the usage of the word "citizens" in the development of the principle involved, forming a basis for the extension of federal power, carries with it the import that some basic criterion must be present whether it has to do with the right of a citizen to vote, or some other relationship arising between the victim and the United States government. It is untenable to say that the power of the federal government to prosecute should extend to all offenses on the basis of the syllogistic reasoning that by virtue of our republican form of government all natural rights arise therefore from the inhabitant's relationship with his government, and that whatever the relationship may be that the federal power should be extended for the protection thereof. The argument is likewise untenable when restricted to conspiracies simply on the basis that the statute refers to conspiracies without regard as to whether the object of that conspiracy comes within the qualifying prerequisite necessary for the extension of the federal power against the offender for his wrong doing. It has been conceded by the Appellant that only three of the Appellees charged were officers and that all others were private individuals; surely it cannot be contended with any reasonableness that by virtue of the fact that the private citizens were charged with acting under color of law under 242 by the aid of the aiding and abetting statute, that the aiding and abetting statute makes them de jure or de facto officers capable of a violation of a substantive offense under Section 242, and that likewise they can be reached by 241

solely by virtue of this new acquired status under the aiding and abetting statute. Such a proposition is not reasonable but it does appear to have arisen in the theory of the Appelant's presentation. The indictment used the words "under color of law". This alone would seem to be a concession on the part of the Appellant that something must provide the basic criterion for the extension of federal power. It may also be an acknowledgment of the weakness of the position that conspiracy punished as a misdemeanor under 371 can be extended to a felony by having the alleged offenders charged under 18 U. S. C. 241. From such language it does appear that the draftsman of the indictment under Section 241 realized the necessity of having something more to tie the offense to than that of a conspiracy to commit false imprisonment and murder, and to this end he uses the words "under color of law" and seeks by such terminology to be better able to have as its ultimate exponent the prohibitions and protections afforded by the Fourteenth Amendment. In the case at bar, we are not dealing with a pattern or custom concerning which a failure of due process is claimed, but are simply dealing with an alleged conspiracy to commit an assault and battery and murder, claimed to be in violation of due process of law.

It would be elementary to say that under the current decisions of this Court that there must be present some reason for the extension of federal power, such as in an intervention case where it is alleged that due process has been denied by the defendants under a State law, ordinance or custom, which is in no wise the case at bar, and such should not be presumed in order to extend the Federal powers of our great government under Section 241. The balance of power must be necessarily maintained, and this we feel is in line with the principle laid down by this Honorable Court in UNITED STATES v. WILLIAMS 341 US. 70; 71 S. Ct. 581, and that such is the real issue here involved.

II

THE DISTRICT COURT IN CASE NUMBER 60 DEALT WITH AN INTERPRETATION OF THE INDICTMENT, OR THE SUFFICIENCY OF THE ALLEGATIONS THEREOF AND THERE IS NO JURISDICTION ON DIRECT APPEAL.

In the case of BROWN v. UNITED STATES, (6 CA) 204 F. 2d 247, Brown was convicted of violating 18 U. S. C. 371, and charged with violation of 18 U. S. C. 242, which was dismissed because he was a private citizen and not an officer acting under color of law as in COMMONWEALTH OF VIRGINIA v. RIVES, 100 US. 313; UNITED STATES v. CRUIKSHANKS, 92 US. 542; SCREWS v. UNITED STATES, 325 US. 110, 65 S. Ct. 1039, wherein such action was held to be correct. However, the fact that a private individual may be legally incapable of violating 242 does not render him immune from a charge of violating 18 U. S. C. 371, as in UNITED STATES v. THIERWEILER D. C., 52 F. Supp. 4, and as in CALLAN v WILSON, 127, US. 540; 8 S. Ct. 1301, a person may be guilty of conspiring, although incapable of committing the objective offense.

In case number 60 the substantive charge against the private individuals under Section 242 should have been dismissed because, as stated by the District Court (R. 19), it was not charged as an ultimate fact that the private individual, or either of them, did anything as an official under color of any law, statute, ordinance, regulation, or custom as 242 provides and as a violation thereof would require. "The indictment states that three of the defendants were acting as officers in all that they did, but it does not state or indicate that any of the other individual defendants were officers in fact, or de facto in anything allegedly done by them 'under color of law'." (R 20).

The United States now contends that the Appellees who are private individuals should now be reached by 18 U. S. C. 2, the aiding and abetting statute. Nothing was said in the indictment concerning this statute, and no words were used in the indictment to bring private individuals under section 242; hence the decision of the lower court was based upon, at least in part, the inadequacy of the indictment as such to charge the alleged offense, or to make reference to 18 U. S. C. 2, and such being the case there is no jurisdiction on direct appeal. UNITED STATES v. SWIFT & COMPANY, 318 US. 442, 87 L. ed. 89, and of course the Government's appeal must be based upon the authority given by the statute invoked as grounds for the appeal. UNITED STATES v. JANITCS (CA3) 161 F. 2d 19. Further, 18 U. S. C. 2 having not been presented as a part of the case before the District Court, the proposition contended for by the Government should not be heard by the Court on appeal. UNITED STATES v. GEORGE, 228 US. 14, 57 L. ed. 712, 33 SCR 412.

We, therefore respectfully submit that the question of whether or not the individual citizens could be prosecuted under Section 242 by way of the aiding and abetting statute was also dependent upon the wording of the indictment, and therefore in any event there was no construction of the Statute by the District Court in case number 60 and this honorable Court should accordingly not take jurisdiction of the same.

CONCLUSION

For the foregoing reasons the judgment of the District Court in dismissing the indictment in number 59 should be affirmed. As to case number 60, the decision of the District Court being based upon, at least in part, a mere interpretation of the indictment as to the necessary allegation of facts, and references to statutes intended as exponents, this Honorable Court does not have jurisdiction to review case number 60.

Respectfully submitted

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October 1965

CERTIFICATE OF SERVICE

This is to certify that on the ____day of October 1965, I served five copies of the foregoing Brief for the Appellees upon Honorable Thurgood Marshall, Solicitor General, Department of Justice, Washington 25, D. C., by mailing five copies of said Brief by first class air mail, postage prepaid, to him at the aforesaid business address pursuant to the requirements of Rule 33, Rules of the Supreme Court of the United States.

H. C. Mike Watkins, one of
Counsel for the Appellees.